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No. 93-1001

In The

Supreme Court of the United States

October Term, 1993

ALLIED-BRUCE TERMINIX COMPANIES, INC., ET AL.,

Petitioners,

v.

G. MICHAEL DOBSON, ET AL.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Alabama

BRIEF OF THE ALABAMA WATER AND WASTEWATER INSTITUTE, THE ALABAMA MANUFACTURED HOUSING INSTITUTE AND THE ALABAMA PEST CONTROL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, makes an agreement to arbitrate enforceable, as a matter of federal law, provided that it is part of "a contract evidencing a transaction involving commerce." The question presented here is as follows:

Whether the Alabama Supreme Court correctly held - contrary to the view taken by the majority of state and federal courts - that Section 2 is inapplicable to contracts otherwise involving interstate commerce if the parties did not "contemplate[] substantial interstate activity" at the time they entered the contract.

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INTEREST OF AMICI CURIAE

The Alabama Water and Wastewater Institute (hereinafter "AWWI"), formerly known as the Alabama Water and Sewer Institute, is a non-profit organization representing thirteen of the largest water producers in the State of Alabama. Its members are public corporations and municipal boards organized and existing pursuant to Acts of the Legislature of Alabama for the purpose of operating water and/or sanitary sewer facilities within the State of Alabama. AWWI has an interest in this case in

that its members regularly enter into contracts in the State of Alabama. Said contracts include agreements for engineering services and other professional services, for construction of public facilities, and for the purchase and lease of real and personal property. The members of AWWI have an interest in state court enforcement of agreements to submit disputes arising from these contracts to binding arbitration in order to control the increasing costs of litigation that drain funds designated for public purposes.

The Alabama Manufactured Housing Institute (hereinafter "AMHI") is a non-profit trade association representing all segments of the manufactured housing industry. Its members include nearly 450 manufactured home manufacturers, retailers, parts suppliers, providers of services including delivery and installation, finance and insurance companies, park owners and developers. AMHI has an interest in this case in that the members of AMHI regularly enter into contracts in the State of Alabama. The members of AMHI have an interest in state court enforcement of agreements to submit disputes arising from these contracts to binding arbitration in order to control the increasing costs of litigation affecting all aspects of the manufactured home industry.

The Alabama Pest Control Association (hereinafter "APCA") is a non-profit trade association representing over eighty-five percent of the licensed pest control operators in the State of Alabama, including large, international companies as well as local sole proprietorships. Pest control companies of all sizes are represented on APCA's five member executive board. APCA was formed in 1947 for the purpose of uniting the growing pest

control industry in a concern for the safety and health of customers and pest control operators. Since its formation, APCA has been an instrumental force in advancements in training, equipment and chemical development fundamental to this goal.

APCA has an interest in this case in that its members regularly enter into termite bonds with customers in the State of Alabama that contain predispute arbitration clauses substantially similar to that at issue in the instant case. These termite bonds are typically issued to customers at the time of initial treatment of their homes for termites and may be terminated by the pest control company only for cause. Once a customer purchases a termite bond, he may renew it annually, in most cases indefinitely, without fear of cancellation, so long as he maintains his home. In addition, many of these bonds are assignable by a homeowner to subsequent purchasers.

The members of APCA have an interest in the courts of Alabama enforcing agreements to submit disputes arising from these termite bonds to binding arbitration in order to control the increasing costs of litigation affecting all aspects of the pest control industry. The Alabama Supreme Court's refusal to recognize the application of the Federal Arbitration Act to these bonds, many of which have been in force for several years, substantially impairs the rights of the members of APCA under said contracts as well as the rights of consumers of pest control services to affordable prices. APCA estimates that the cost to Alabamians in 1992 for control of household and structural pests and in damages caused by structural pests exceeded four hundred sixty million dollars ($460,000,000.00).

Petitions for Writs of Certiorari to the Alabama Supreme Court involving the same issue presented in this case are pending before this Court in *Terminix International Company Limited Partnership and Allied-Bruce Terminix Companies, Inc., v. Jackson*, 628 So.2d 357 (Ala. 1993), and in *Lopez v. Home Buyers Warranty Corporation*, 628 So.2d 361 (Ala. 1993). The arguments presented by AWWI, AMHI, and APCA also support the positions advocated by the said petitioners in these related cases.

If the arguments of AWWI, AMHI, and APCA are approved by this Court, the decision of the Alabama Supreme Court must be reversed.

SUMMARY OF THE ARGUMENT

This Court has held that the Federal Arbitration Act applies to the full extent of the power of Congress over interstate commerce. *Perry v. Thomas*, 482 U.S. 483, 490 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984); *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 401 (1967). The holding of the Supreme Court of Alabama in the case of *Allied-Bruce Terminix Companies, Inc., v. Dobson*, 628 So.2d 354 (Ala. 1993), undermines the broad and liberal federal policy favoring the enforceability of arbitration agreements by limiting the application of the Federal Arbitration Act to transactions where the parties actually contemplated, at the time they entered into the contract, substantial interstate activity. The Supreme Court of Alabama's restriction on the

application of the Federal Arbitration Act is clearly contrary to the precedent of this Court.

ARGUMENT

The Federal Arbitration Act (hereinafter "FAA") provides that arbitration clauses in contracts "involving commerce," where commerce is defined as "commerce among the several States," shall be enforceable. 9 U.S.C. § 2. The issue in the present case has arisen because the Alabama Supreme Court has interpreted the phrase "contracts involving commerce among the several States," as used in the FAA, to invoke less power than Congress has under the Commerce Clause to regulate activities "affecting" interstate commerce. In short, the Alabama Supreme Court has disregarded the precedent of this Court requiring that the FAA be applied to the full extent of Congressional power under the Commerce Clause.

This Court stated in *Perry v. Thomas*, 482 U.S. 483, 490 (1987), that the FAA provides "for the enforcement of arbitration agreements within the full reach of the Commerce Clause." It is clear that the FAA is based upon the commerce power of Congress, and that contracts are to be construed liberally in favor of arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 12-13 (1984) ("[T]he [FAA] was an exercise of the Commerce Clause power."); *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."); *Prima Paint Corp. v.*

Flood & Conklin Mfg. Co., 388 U.S. 395, 401 (1967) ("It is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.' "); *See also Bernhardt v. Polygraphic Company*, 350 U.S. 198, 200-201 (1956). Moreover, this Court has stated that "[t]he purpose of the [FAA] was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by . . . state courts." *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

A majority of the federal circuit courts of appeals and federal district courts have interpreted the term "involving commerce" to bring within the FAA all contracts that Congress could constitutionally regulate under the Commerce Clause.[1] AWWI, AMHI, and APCA urge this Court

[1] *E.g., Del E. Webb Const. v. Richardson*, 823 F.2d 145, 147 (5th Cir. 1987) (A contract comes under the FAA so long as it simply relates to interstate commerce.); *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986) ("Commerce" under the FAA includes all contracts relating to interstate commerce.); *American Airlines, Inc. v. Louisville and Jefferson County Air Board*, 269 F.2d 811 (6th Cir. 1959) (FAA was enacted in exercise of Congress' plenary power over interstate commerce.); *Snyder v. Smith*, 736 F.2d 409 (7th. Cir. 1984) (The breadth of "involving commerce" is equated with the extent of Congress's power to regulate under the commerce clause; Congress intended the FAA to extend to all contracts that it could constitutionally regulate.); *First Investors Corp. v. American Capital Financial Services, Inc.*, 823 F.2d 307 (9th Cir. 1987) (FAA governs agreements "affecting" interstate commerce.); *Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986) (Requirement of FAA that underlying transaction involve commerce is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause.); *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1354 (11th Cir. 1983) ("Commerce" includes any intrastate transaction which "affects" interstate commerce.); *G.D. Searle & Co. v. Metric Constructors, Inc.*, 572 F.Supp. 836 (N.D.Ga. 1983) (It has consistently been noted that federal policy favors arbitration and that the statute should be broadly applied.); *Fairchild & Co., Inc. v. Richmond, F. & P.R. Co.*, 516 F.Supp. 1305 (D.C.D.C. 1981) ("[I]nvolving commerce" as used in FAA is not to be narrowly construed as "commerce" reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.); *John W. Johnson, Inc. v. 2500 Wisconsin Ave.*, 231 F.2d 761 (D.C.Cir. 1956).

to sustain the validity of the majority position as consistent with Congressional intent as expressed in the FAA.

Where courts have taken a more restrictive position than that of the majority and have interpreted the FAA to have less force than the Commerce Clause permits, the outcome has been an arbitrary and uncertain counting of the contacts between the contract and the states other than the one in which it is being, or was intended to be, performed in order for the trial court to determine whether the FAA preempts state law and allows arbitration to proceed.[2] Although such a fact finding process

[2] *E.g., Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971) (Contract was not a transaction involving commerce since there was no movement of goods across state lines.); *Thomas O'Connor & Co., Inc. v. Insurance Co. of North America*, 697 F.Supp. 563 (D.Mass. 1988) (Construction contract involved commerce where New York contractor performed work in New Jersey, materials came from outside New Jersey, and subcontractor was citizen of Massachusetts.); *New Castle County v. U.S. Fire Ins. Co.*, 728 F.Supp. 318 (D.Del. 1989) (Settlement agreement between insurer and county, who were citizens of different states, which involved at least $184,000 was a contract involving commerce

may be less subjective than the "contemplation of the parties" test adopted by the Alabama Supreme Court, the

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under the FAA.); *Goodwin v. Elkins & Co.*, 730 F.2d 99, *cert. denied* 105 S.Ct. 118 (3rd Cir. 1984); *compare Kirschner v. West Co.*, 185 F.Supp. 317, 319 (D.C.Pa. 1960) ("Commerce" means the type of commerce which is within federal jurisdiction, that is, interstate or foreign commerce.); *AM. Home Assur. v. Vecco Concrete Const., Etc.*, 629 F.2d 961 (4th Cir. 1980) (Transaction between Delaware Corporation, with its principal place of business in Alabama, and Virginia Corporation, which included subcontracts and purchase orders for products and equipment shipped to Virginia from Maryland, Alabama, Utah, Missouri and California, which employed non-residents in the project, and used a New York bonding company to guarantee performance, clearly demonstrated that the contract was one evidencing a transaction involving interstate commerce as contemplated by the FAA.); *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 750 F.Supp. 455 (D.C.Kansas 1990) (Reinsurance agreement between two insurers involved interstate commerce within the FAA even though contract negotiations transpired within Kansas, where parties were of diverse citizenship, the agreement was originally drafted in Illinois, and business was transacted over the telephone and through the mail.); *Axtell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 744 F.Supp. 194, 195 (E.D.Ark. 1989) (Customer agreement signed by investors that contained arbitration agreement affected "commerce" within the meaning of the FAA.); *compare Seymour v. Gloria Jean's Coffee Bean Franchising Corp.*, 732 F.Supp. 988 (D.Minn. 1990) (Federal Arbitration Act is based on congressional power to regulate interstate commerce.); *England v. Dean Witter Reynolds, Inc.*, 811 S.W.2d 313 (Ark. 1991) (Employment contract to work for securities broker was contract involving interstate commerce.); *McEntire v. Monarch Feed Mills*, 631 S.W.2d 307 (Ark. 1982) (Contract involved interstate commerce where Missouri based grain purchaser with manufacturing facilities in Missouri and Arkansas contracted to purchase grain from farmer in Arkansas for delivery to its manufacturing plant in Arkansas.); *Ayers v. Prudential-Bache Securities*, 762 P.2d 743 (Colo.App. 1988) (citing *Robinson v. Bache*

practical result may well be lengthy trial court involvement in a fact finding expedition that ultimately thwarts the goals of the FAA.

& Co., 227 F.Supp. 456 (S.D.N.Y. 1964) (A contract between a brokerage firm and its customer is a contract evidencing a transaction involving commerce within the meaning of the FAA.); *Helca Min. Co. v. Bunker Hill Co.*, 617 P.2d 861 (Idaho 1980) (FAA applied to contract between two mining companies because contract clearly involved interstate commerce.); *Kodak Min. Co. v. Carrs Fork Corp.*, 669 S.W.2d 917 (Ky. 1984) (A contract was found to involve interstate commerce where the parties were incorporated in different states, arbitrators under the agreement were selected by federal judges from different states, and the leases in question involved interstate commerce.); *Kaufman v. The Chicago Corp.*, 466 N.W.2d 726 (Mich. App. 1991) (Employment contract with member of national stock exchange involves interstate commerce.); *Scanlon v. P&J Enterprises, Inc.*, 451 N.W.2d 616 (Mich.App. 1990) (Transfer of market expertise from Tennessee to Michigan through a franchise agreement was a transaction in interstate commerce.); *Thayer v. American Financial Advisers, Inc.*, 322 N.W.2d 599, 603-604 (Minn. 1982); *Downey v. Christensen*, 825 P.2d 557 (Mont. 1992) (Dealership agreement was contract evidencing interstate commerce.); *compare William Gibson Jr. Inc. v. James Graff Com.*, 780 P.2d 1131 (Mont. 1989) (Where 5% of business was conducted out of state there was sufficient activity to affect interstate commerce under the FAA.); *Dowd v. First Omaha Securities Corp.*, 495 N.W.2d 36 (Neb. 1993) (Written contract to buy and sell securities is contract directly involved in interstate commerce.); *Dean Witter Reynolds, Inc. v. Roven*, 609 P.2d 720 (N.M. 1980) (Contract concerning commodity trading of gold futures is contract involving commerce under the FAA.); *Trombetta v. Conkling*, 586 N.Y.S.2d 461 (Supp. 1992) (Disputes arising out of employment in the securities market involve interstate commerce.); *Episcopal Housing Corporation v. Federal Insurance Company*, 239 S.E.2d 647 (S.C. 1977) (A construction contract evidences transactions in commerce where labor, supplies and materials from all over the country were

The financial risks of the party seeking to enforce a predispute arbitration clause may force the party to forego the battle over enforceability of the clause for fear that it may have doubled its litigation costs if the trial court ultimately denies the motion to arbitrate. As noted by this Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983), the FAA is designed to allow "parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible." In *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984), this Court observed that " . . . allowing one party to ignore [an arbitration clause in] the contract and resort to the courts . . . could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate."

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utilized in the construction.); *Tennessee River Pulp & Paper v. Eichleay*, 637 S.W.2d 853 (Tenn. 1982) (Contract in this case found to evidence a transaction involving interstate commerce where contract exceeded $15,000,000.00 and was between two Delaware corporations; the plaintiff's home office was in Illinois; defendant's home office was in Pennsylvania; the materials used, the labor employed, and the subcontractors involved, in substantial part, came from outside Tennessee; substantial quantities of materials and supplies came from 26 different states; 34% of all materials and supplies were purchased outside of Tennessee.); *International Bank of Commerce v. Caquias*, 846 S.W.2d 496 (Tex.App.-Corpus Christi 1993) (Where loan funds provided under note were derived from interstate financial markets the loan was a transaction involving commerce.); *See also Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266 (Tex. 1992); *Kinsey v. Bradley*, 765 P.2d 1329 (Wash.App. 1989) (Commodities account customer agreement involved interstate commerce.); *See also Wineland v. Marketex International, Inc.*, 627 P.2d 967 (Wash.App. 1981); *See also Allison v. Medicab International, Inc.*, 597 P.2d 380 (Wash. 1979).

The restrictive standard for applying the FAA adopted by the Alabama Supreme Court goes even farther, requiring the trial judge to engage in an analysis of the subjective intent of the parties. If this standard is sustained, Alabama courts may determine that the issue of the parties' intent is itself a jury question. The subjective nature of this test is exaggerated by the inclusion of the "*substantial* interstate activity" requirement. Even those litigants who were aware of the potential involvement of interstate commerce in the performance of the contract when it was entered may easily defeat motions to enforce arbitration clauses by denying that they contemplated "*substantial* interstate activity," since "substantial" is itself a subjective word open to the litigant's own interpretation.

The adoption of this standard represents a revival of the Alabama Supreme Court's longstanding hostility towards arbitration. In *Ex parte Alabama Oxygen*, 433 So.2d 1158 (Ala. 1983), *vacated and remanded*, 465 U.S. 1016 (1984), this Court was called upon to reverse the Alabama Supreme Court's opinion that the FAA did not preempt state law prohibiting enforcement of arbitration agreements. In the ten year period since, the Alabama Supreme Court has gradually returned to its original stance on the issue. Under Alabama law, the specific enforcement of a predispute arbitration agreement violates public policy. See *Alabama Code* (1975), section 8-1-41(3); *Old Republic Insurance Company v. Lanier, et al.*, [Ms. 1921387, April 29, 1994], ___ So.2d ___ (Ala. 1994). Even when the application of the FAA is undisputed, the Alabama court continues to look to the "strong public policy against the use

of predispute arbitration agreements" to restrict the coverage of arbitration provisions. *Old Republic Insurance Company*, Slip Op. at 9.

The Alabama Supreme Court's recent opinion in *Old Republic Insurance Company* illustrates the court's mission to provide every route possible to litigants to avoid FAA pre-emption of this "strong public policy." The error in the court's reasoning was first recognized by Justice Maddox in 1984 in his dissenting opinion in *Ex parte Alabama Oxygen Co.*, 433 So.2d 1158 (Ala. 1983) (Maddox, J., dissenting), *vacated and remanded*, 465 U.S. 1016 (1984), which opinion was adopted by the majority on remand from this Court. *Ex parte Alabama Oxygen Co.*, 452 So.2d 860 (Ala. 1984).

Justice Maddox has again recognized the error of the majority in his dissenting opinion in *Old Republic Insurance Company*, Slip Op. at 14-19, by noting that,

> [i]n *Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983), the Supreme Court of the United States stated that § 2 of the FAA stands for "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" and "creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Therefore, I am of the opinion that if the contract involved is one involving interstate commerce and the contract contains an arbitration agreement voluntarily entered into by the parties, federal policy favoring arbitration agreements must be applied, notwithstanding what the majority

> refers to as "our strong public policy against the use of pre-dispute arbitration agreements."

The erroneous subjective standard adopted by the Alabama Supreme Court originated in the Second Circuit Court of Appeal's opinion in *Metro Indust. Painting v. Terminal Const. Co., Inc.*, 287 F.2d 382 (2nd Cir. 1961), *cert. denied*, 368 U.S. 817 (1961), and has not been adopted by any federal circuit court of appeals. In *Metro*, Chief Judge Lumbard, in his concurring opinion, created the restrictive standard stating that a contract involves interstate activity if at the time the parties entered into it and accepted the arbitration clause, they contemplated substantial interstate activity. The majority did not address the issue, stating that irrespective of whether Congress intended the coverage of the FAA to be as broad as the constitutional dimensions of the commerce power, the facts found by the judge below were sufficient to support a finding that the transaction evidenced by the contract was within the statutory requirements of the FAA.

With litigation expenses rising and increasing the costs of services and products offered by AWWI, AMHI, and APCA members to consumers of their products and services, arbitration is an increasingly popular alternative for dispute resolution. In order for arbitration to be effective, however, the cost of enforcing arbitration agreements at the trial court level must not itself be excessive. The test adopted by the Alabama Supreme Court requires a mini-trial of ancillary issues that may prove as expensive as a trial on the merits in many cases.

The proper standard for courts to apply in determining whether a contract comes within the provisions of the

FAA is whether that contract relates to or affects interstate commerce in any way. Any interstate activity or connection with interstate activity such as a party being from another state, purchase and transportation of materials from another state, or the production of goods within one state for ultimate consumption in another state is sufficient to invoke the coverage of the FAA. The mere fact that the work under a contract is to be performed solely within one state should not prevent the application of the FAA to that contract if the activity under the contract, either through the involvement of parties from other states or through the use of goods from other states, affects or relates to interstate commerce. *Perry v. Thomas*, 482 U.S. 483, 490 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984); *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 401 (1967); *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986); *Snyder v. Smith*, 736 F.2d 409, 417-420 (7th Cir. 1984).

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the Supreme Court of Alabama.

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